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No. 87-671

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

STATE OF CONNECTICUT, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT NATIONAL CABLE TELEVISION ASSOCIATION, INC. IN OPPOSITION

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QUESTION PRESENTED

Was the Federal Communications Commission's determination that the availability of three over-the-air broadcast signals constitutes "effective competition" for purposes of Section 623 of the Cable Communications Policy Act of 1984 arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law?

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The National Cable Television Association, Inc. ("NCTA") respectfully submits this brief in opposition to the Petition for a Writ of Certiorari filed jointly by the State of Connecticut, the City of New York, the National League of Cities, and the American Civil Liberties Union ("Petitioners"). NCTA is the principal trade association of the cable television industry in the United States, representing the owners and operators of cable systems serving over 80 percent of the nation's approxi-

mately 43 million cable subscribers.* NCTA was an intervenor in the proceedings below and is, therefore, a respondent in this proceeding.

STATEMENT OF THE CASE

This case involves the Federal Communications Commission's implementation of one provision of the Cable Communications Policy Act of 1984 (the "Act").[1] That law amended the Communications Act of 1934 to establish, for the first time, a comprehensive federal statutory framework for the regulation of cable television. Embodying a compromise between the cable television industry and state and local governments, the Act generally codified the authority of such governments to require cable operators to obtain franchises before providing service—authority that had been unclear and was increasingly being "challenged at the FCC and in the courts."[2] At the same time, the Act imposed limits on the requirements and conditions that may be imposed by franchising authorities, thereby eliminating many of the burdens and excesses of regulation that had hampered the efficient growth and development of cable in the increasingly competitive marketplace of video and entertainment services.

As Representative Wirth, the chairman of the House Telecommunications Subcommittee and the bill's principal sponsor in the House of Representatives, explained, "[t]he legislation protects local authority over cable television in several important respects."[3] For example, in

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* NCTA has no parent companies, subsidiaries or affiliates.

[1] Public Law 98-549, 98 Stat. 2779 (Oct. 30, 1984), *codified at*, 47 U.S.C. § 521 *et seq.*

[2] 130 Cong. Rec. H10436 (daily ed. Oct. 1, 1984) (remarks of Rep. Wirth).

[3] *Id.*

addition to requiring cable operators to obtain franchises, the Act permits cities to impose annual franchise fees of up to five percent of the cable operator's gross revenues;[4] to enforce franchise requirements for facilities and equipment and for "broad categories of video programming," though not for specific program services;[5] and to require cable operators to provide public, educational and governmental access channels and facilities.[6]

But the legislation also "contains several provisions to provide the industry with the certainty and stability it needs to make large financial investments to construct and operate cable systems."[7] In particular, Section 623 of the Act prohibits the regulation of rates for cable service except in certain, limited circumstances. Although it was understood that the Cable Act would generally deregulate rates after a two-year transition period,[8] Section 623 allows continued regulation of basic cable service "in circumstances in which a cable system is not subject to effective competition."[9] The Act di-

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[4] Act, § 622, 47 U.S.C. § 542.

[5] *Id.*, § 624, 47 U.S.C. § 544.

[6] *Id.*, § 611, 47 U.S.C. § 531.

[7] Remarks of Rep. Wirth, *supra*, 130 Cong. Rec. at 10436.

[8] Rep. Wirth, for example, stated that the Act "[d]eregulates the rates charged for basic cable service in 2 years, allowing the marketplace to dictate the price for cable programming and services . . . ." *Id.*

[9] "The term 'basic cable service' means any service tier which includes the retransmission of local television broadcast signals." Act, § 602(2), 47 U.S.C. § 522(2). Cable operators typically offer a wide range of programming services, such as distant broadcast signals and nonbroadcast satellite-delivered networks, in addition to the retransmission of local signals. Some of these services may be provided along with local broadcast signals as a separately priced package or "tier." Others may be offered together in a separately available tier that does not include local broadcast signals. Still others, such as premium movie channels, may be offered alone

rected the Federal Communications Commission, within 180 days of the law's enactment, to promulgate rules defining "effective competition" for this purpose and establishing standards for basic rate regulation in the absence of effective competition. It is the definition adopted by the Commission, which the court below affirmed, that is at issue in this case.

Completing its rulemaking proceeding within the time period mandated by Congress, the Commission concluded that "a cable system will be considered to face effective competition whenever the franchise market receives three or more unduplicated broadcast signals." [10] In adopting this definition of "effective competition," the Commission rejected proposals of some commenting parties to require the availability of a larger (or smaller) number of broadcast signals. It also rejected proposals to require, in addition to broadcast signals, the availability of non-broadcast alternatives to cable, such as multichannel multipoint distribution systems and direct broadcast satellite-services,[11] that might provide an array of non-broadcast program services comparable to those that are often provided along with local and distant broadcast stations as part of the cable operator's basic service. And it rejected proposals of the Department of Justice and others that would, as described by Petitioners, "apply antitrust market analysis to the 'effective competition' issue." [12]

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on a per-channel basis. Under the Act, only the basic tier rate may ever be regulated, and it may only be regulated in the absence of "effective competition." Act, § 623(b), 47 U.S.C. § 543(b).

[10] *Report and Order*, ¶ 100 (Appendix to Petition for Writ of Certiorari at A17). (Hereinafter, the Appendix will be cited as "Pet. App. at ——.")

[11] *See* Comments of National League of Cities at 45 (Jan. 28, 1985).

[12] Petition for Writ of Certiorari ("Petition") at 18.

The Commission acknowledged these proposals but explained why, in its view, "the existence of three or more off-the-air broadcast signals in the cable market provides viewers with adequate programming choices and presents an effective constraint on the market power of a cable system in the provision of basic service." [13] With respect to the requisite number of broadcast signals, the only empirical evidence submitted by commenting parties—an economic analysis of cable rates in unregulated markets submitted by NCTA—indicated that, while the availability of the first, second and third broadcast signal in a community each has an incremental competitive effect on the price of basic cable service, additional signals have no further effect on basic rates.[14] A three-signal threshold was also indicated by a study, conducted by the Commission's staff, of Arbitron viewership data in markets with two, three, four and five available broadcast signals. That study showed that viewership of basic cable programming other than locally available broadcast stations was sufficiently high to indicate possible market power in markets with fewer than three available broadcast signals, but not in markets with three or more signals.[15] Absent any empirical evidence indicating that broadcast signals beyond the third would have any significant effect on basic cable rates, the Commission determined that its definition of effective competition should require no more than three such signals.

With respect to its decision to define effective competition solely in terms of availability of local broadcast signals and not to require the availability of nonbroadcast alternatives to cable, the Commission acknowledged "that

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[13] *Report and Order*, ¶ 100 (Pet. App. at A46).

[14] *See*, Comments of the National Cable Television Association and Community Antenna Television Association, Appendix A (Jan. 28, 1985).

[15] *Report and Order*, ¶ 99 (Pet. App. at A46-47).

many cable systems provide a number of services in addition to the retransmission of off-the-air signals" [16] as part of their basic service. But "[f]or these additional basic services to be a source of market power, it must first be shown that a significant demand exists for these services and that such demand is relatively inelastic." [17] The Commission found no evidence in the record of any such significant or inelastic demand for access channels or satellite program services provided as part of basic cable service; indeed, it found evidence to the contrary.[18] For this reason, the Commission rejected the notion "that a cable system gains significant market advantage by the provision of this additional programming in those markets where there are sufficient (*i.e.*, three or more) off-the-air broadcast signals." [19]

Finally, in opting for a standard based on available broadcast signals rather than the multi-pronged antitrust market analysis urged by the Department of Justice, the Commission did not dispute the utility and validity of antitrust-style analysis in accurately assessing market power on a case-by-case basis. But, as the Commission noted in its Notice of Proposed Rulemaking, Congress specifically intended that the Commission define effective competition in terms of "readily applicable criteria" and that "[r]egulations should specify objective criteria to avoid the need for an independent examination of the status of competition on a community-by-community basis." [20] The Commission concluded that its

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[16] *Report and Order*, ¶ 100 (Pet. App. at A46).

[17] *Id.*, n.68.

[18] *Id.*

[19] *Id.*, ¶ 100 (Pet. App. at A47).

[20] Notice of Proposed Rulemaking, 49 Fed. Reg. 48765, 48770 (Dec. 14, 1984), *quoting* Report of the Committee on Energy and Commerce, H.R. Rep. 98-934, 98th Cong., 2d Sess. 66 (1984) ("House Report").

standard based on availability of broadcast signals provided "a reasonable benchmark for determining effective competition with basic cable services" and best met "the congressional intent of an administratively manageable standard for the Commission, franchising authorities and cable operators." [21]

None of the Petitioners sought reconsideration by the Commission of its "effective competition" standard. Instead, they went directly to the court of appeals, where they "launch[ed] a broad assault on virtually every argument cited by the FCC in support of its rules, and every component of the rules themselves." [22] The court determined, however, that the Commission had acted reasonably both in defining "effective competition" solely in terms of the availability of a certain number of broadcast signals and in selecting three as the appropriate number. The court found that the Commission had "considered the alternatives suggested by the commenters and offered cogent reasons for adopting a three-signal availability standard." [23]

The court of appeals also found, however, that, while defining effective competition to exist where three broadcast stations are available was wholly reasonable, the Commission had acted arbitrarily in determining when a broadcast station should be deemed "available." Under the Commission's rules, a station would be considered available if it placed a signal of Grade B strength over "any portion" of the cable community. The court held that if a signal was to be deemed available as an effective competitor to cable service, "it was incumbent upon the FCC to craft the standard more carefully, to ensure

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[21] *Report and Order*, ¶ 98 (Pet. App. at A45).

[22] *American Civil Liberties Union v. FCC*, 823 F.2d 1554, 1563 (D.C. Cir. 1987) (Pet. App. at A141).

[23] *Id.* at 1564 (Pet. App. at A144).

that a signal is at least theoretically available over the entire cable community or at least some significant portion of the cable community." [24] The court also rejected two minor aspects of the standards adopted by the Commission governing rate regulation in those communities where, because fewer than three broadcast stations are available, rate regulation remains permissible.[25] But apart from these exceptions, the court held "that the FCC's rate regulation rules are affirmed in all respects." [26]

ARGUMENT

This case raises no unusual, unresolved or extraordinary issues that warrant review by this Court. In determining that the Commission acted reasonably in implementing its statutory mandate, the court below applied well-established principles of administrative law and statutory construction. Although Petitioners seek to portray the Commission's decision as arbitrary and inconsistent with the Act and the court's decision as erroneous, their real complaint is that they would like more regulatory authority over rates than the Act gave them. To the extent that there has been a "nationwide impact" on the "traditional cable rate regulation powers" of state and local governments, as alleged by Petitioners,[27] such impact is directly attributable to the Act—which was specifically intended to prohibit rate regulation except in

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[24] *Id.* at 1572 (Pet. App. at A160-61). The Commission is currently conducting a rulemaking proceeding to amend its definition of signal availability. *See Implementation of Cable Communications Policy Act of 1984*, 52 Fed. Reg. 36801 (Oct. 1, 1987).

[25] 823 F.2d at 1565-71 (Pet. App. at A145-158). The Commission has already amended its standards in accordance with the court's decision. *See Amendment to the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984*, 52 Fed. Reg. 37461 (Oct. 7, 1987).

[26] 823 F.2d at 1564 (Pet. App. at A143).

[27] Petition at 15.

limited circumstances—and not to any novel or arbitrary substantive or procedural approaches taken by the Commission or by the court below.

As evidence of the impact of rate deregulation or of changed conditions in the video marketplace becomes available, the Commission is required by the Act to "periodically review" [28] its rules and, in any event, must prepare a report for Congress on rate deregulation and "the effect of competition in the marketplace" before October 30, 1990.[29] Moreover, Congress is closely monitoring the effects of its deregulatory mandate.[30] If implementation of the Act leads to results that Congress either did not intend or does not desire, it can and will make its views known to the Commission and amend the Act. But Petitioners present no basis whatever for concluding that, in light of the statute, the legislative history and the rulemaking record, the Commission's rules are in any respect arbitrary, capricious or otherwise not in accordance with law.

I

Petitioners contend that the court of appeals ignored and therefore "sanction[ed] a significant departure from" [31] this Court's edict that, in construing statutes, courts and agencies "must give effect to the unambiguously expressed intent of Congress." [32] The court of appeals was, however, well aware of that principle and, in fact, relied specifically upon it in invalidating one of the Commission's standards governing rate regulation in the

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[28] Act, § 623(b)(3), 47 U.S.C. § 543(b)(3).

[29] *Id.*, § 623(h), 47 U.S.C. § 543(h).

[30] The House Telecommunications Subcommittee intends to hold oversight hearings on the implementation of the Act in March 1988. *See Broadcasting*, Feb. 15, 1988, p. 18.

[31] Petition at 15.

[32] *Id.* at 16, *quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

absence of effective competition.[33] But it upheld the Commission's approach to defining effective competition because, contrary to Petitioners' faulty reading of the Act, that approach was in no way inconsistent with the explicit legislative intent.

Petitioners complain, first, that while the Act directs the Commission to "define the circumstances in which a cable system is not subject to effective competition," the Commission erroneously interpreted its task as defining the circumstances in which a cable system's *basic service* is not subject to effective competition. The Commission's approach was, in fact, not only reasonable on its face but wholly consistent with the "expressed intent of Congress."

Thus, Congress specifically intended "that this rulemaking focus solely on whether there is effective competition *sufficient to warrant the regulation of rates for basic cable service.*" [34] This follows from the fact that the only rates that can be regulated under the Act, even in the absence of effective competition, are rates for basic service. In its comments in the rulemaking proceeding, the Department of Justice explained why it would, therefore, be irrational to define effective competition, for purposes of the Act's rate regulation provisions, in terms of anything other than basic service:

> It would make little sense . . . to regulate the price of basic cable service if all of a cable system's market power was derived from and could be exercised in the provision of services that are expressly excluded from rate regulation under the Act.[35]

Second, Petitioners contend that, even if it was correct to focus on effective competition for basic cable service,

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[33] *See* 823 F.2d at 1565-70.

[34] House Report, *supra*, at 66 (emphasis added).

[35] Comments of the United States Department of Justice at 24 (Jan. 28, 1985).

the Commission erroneously viewed basic cable service as only that portion of the basic tier that includes local broadcast signals and "excluded all non-broadcast programming (except access channels)" [36] that might also be provided on the same tier. In so doing, the Commission, according to Petitioners, ignored the unambiguous statutory definition of "basic cable service," which encompasses the entire "tier which includes . . . local television broadcast signals." [37]

The Commission, however, did no such thing. Having observed, in its Notice of Proposed Rulemaking, that "[i]n essence, basic cable service is the provision of locally viewed broadcast signals" [38]—because, "as a matter of definition," [39] basic service always includes local broadcast signals but may or may not include various nonbroadcast services—the Commission nevertheless selected a standard that was intended to reflect the number of available local broadcast signals necessary to provide effective competition to the entire basic service package. Thus, the Commission recognized that "many cable systems provide a number of services in addition to the retransmission of off-the-air signals" [40] on their basic service tiers. But it specifically concluded that cable systems would not gain "significant market advantage by the provision of this additional programming in those markets where there are sufficient (*i.e.*, three or more) off-the-air broadcast signals." [41]

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[36] Petition at 16.

[37] Act, § 602, 47 U.S.C. § 522.

[38] *Notice of Proposed Rulemaking, supra,* 49 Fed. Reg. at 48770.

[39] *Id.*

[40] *Report and Order,* ¶ 100 (Pet. App. at A46).

[41] *Id.* (Pet. App. at A47). By implication, the Commission determined that cable systems might be able to exercise market power from the provision of services other than local broadcast signals in markets with fewer than three such signals. If, as Petitioners

Finally, Petitioners contend that Congress unambiguously directed the Commission not to define effective competition solely in terms of a specific number of broadcast signals. But, as the court of appeals recognized, that is not what the Act or the legislative history actually says. Petitioners point to no provision of the Act imposing such a directive, and their attempt to read such a requirement into the legislative history was correctly rejected by the court of appeals. The legislative history suggests, first, that the Commission, in fashioning a standard, "should consider the number and nature of [cable] services provided, compared with the nature and number of services available from alternative sources and, if so, at what price," and, second, that it "may find it relevant to consider factors in addition to the number of over-the-air broadcast stations in a market . . . ."[42] Thus, as the court of appeals concluded, "[t]he FCC's mandate was to 'consider' various alternatives, including, it seems, one in which effective competition would be measured solely in terms of the availability of broadcast signals."[43]

If the Commission had determined that broadcast signals alone were not sufficient to constrain market power in the provision of basic cable service but nevertheless selected a standard based solely on the availability of broadcast signals, Petitioners' challenge might have been persuasive. But having considered the alternatives and determined that three broadcast signals were gen-

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suggest, the Commission was only concerned with whether there was effective competition for the local broadcast component of basic service, it would necessarily have concluded that there was *always* effective competition. Even where there are only one or two available local broadcast stations, the availability of those signals to viewers over-the-air free of charge obviously constitutes effective competition to the provision of those same signals by a cable system.

[42] House Report, *supra*, at 66.

[43] 823 F.2d at 1564 (Pet. App. at A144).

erally sufficient to provide effective competition to basic cable service, the Commission was not constrained (and it would have been irrational) to require in its standard the additional availability of other nonbroadcast programming sources.[44]

II

Petitioners contend that, in failing to adopt a definition of effective competition that embodies "antitrust market analysis," the Commission violated "the accepted and usual doctrine that requires agencies to consider all relevant factors and explain departures from longstanding policies."[45] They confuse the Commission's refusal to adopt the antitrust approach urged by the Department of Justice with a failure to consider it. Moreover, the fact that the Commission uses marke analysis in regulating telephone common carrier services and facilities pursuant to Title II of the Communications Act of 1934, 47 U.S.C. Sec. 201 *et seq.* does not make its rejection of such an approach in implementing a wholly different statutory task a "departure from longstanding policies."

In its *Report and Order*, the Commission specifically acknowledged that the Department of Justice had pro-

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[44] Petitioners also argue that, because Congress ultimately rejected a provision in the version of the cable bill initially passed by the Senate, which deregulated rates whenever there were four available broadcast signals, and instead gave the Commission the responsibility of determining what constituted effective competition, Congress clearly did not intend that the Commission ultimately adopt a standard based solely on broadcast signals. *See* Petition at 17-18. This is a wholly unpersuasive argument. In rejecting the Senate-passed provision, Congress cannot even be viewed as having precluded the ultimate adoption by the Commission of a similar four-signal standard. What Congress decided was not that effective competition could not be defined solely in terms of broadcast signals but that it should be defined by the Commission on the basis of a rulemaking record rather than by legislative fiat.

[45] Petition at 18.

posed that effective competition be defined to require "a minimum of five broadcast signals" [46] and that "other criteria be considered in addition to the signal complement." [47] And the Commission also explained why it adopted a different approach.[48] The Commission sought a standard that would, as Congress desired, be "readily applicable" and "avoid the need for an independent examination of the status of competition on a community-by-community basis." [49] As the National Telecommunications and Information Administration (NTIA) had pointed out to the Commission, the multifaceted, antitrust-type approach proposed by the Justice Department "would create an administrative nightmare, something which Congress specifically sought to avoid." [50]

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[46] *Report and Order*, ¶ 95 (Pet. App. at A42).

[47] *Id.*, n.59.

[48] The reason why the Commission "went so far as to dismiss, as based upon 'supposition and intuition,'" the Justice Department's five-signal proposal, Petition at 18, is that the Department had itself stated that "it appears *intuitively* that five broadcast stations are necessary," but that "the precise number of stations could be determined with more accuracy if reliable empirical evidence were available—and could be more or less than we suggest." Department of Justice Comments at 37 (emphasis added). Studies by NCTA and the Commission's staff supplied empirical evidence that showed that a three-signal standard was more appropriate.

[49] House Report, *supra*, at 66.

[50] Reply Comments of NTIA 5 (Feb. 11, 1985). What the Justice Department specifically proposed was that effective competition be presumed to exist if any two of the following criteria were satisfied: First, "at least five unduplicated broadcast stations, including affiliates of the three networks, can be received adequately by consumers in the cable system's franchise area." Second, "the total number of channels on the basic tier, excluding local access, teletext and similar channels, is less than three times the number of broadcast stations that can be received adequately in the cable system's franchise area . . . . For the purpose of applying this criteria, the number of channels on the basic tier should be reduced by the number of substitute channels actually provided in the market by al-

Ultimately, the Commission concluded that three broadcast signals would generally be sufficient to constrain basic cable rates. And, in rejecting alternative standards that might require consideration of additional marketplace factors, the Commission explained that the three-signal standard "meets the congressional intent of an administratively manageable standard for the Commission, franchising authorities and cable operators." [51]

III

Finally, Petitioners complain that the Commission should not have been permitted by the court of appeals to have relied upon a study conducted by its staff in the course of the rulemaking proceeding because the study was "virtually unavailable for public comment" [52] until the Commission issued its *Report and Order*. In fact, the Commission dealt with its internal study in a manner wholly consistent with sound administrative procedure and precedent.

There is no legal doctrine that prevents an agency from using its own resources to supplement or confirm the evidence in a rulemaking record by conducting a study in the course of the proceeding. If, in such circumstances, "[t]he staff studies were placed in the pub-

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ternative delivery systems at a price comparable to that charged for basic service." Third, "[n]o more than 20 percent of the cable system's subscribers subscribe only to the basic tier as of the date of the Act." Department of Justice Comments, *supra*, at 36-41.

Senator Goldwater, the Cable Act's principal sponsor in the Senate, specifically urged the Commission to reject this "convoluted" standard because it was a "complicated and theoretical antitrust approach to what Congress intended to be simple and practical rulemaking." Letter of Sen. Goldwater to Chairman Mark S. Fowler (Mar. 26, 1985).

[51] *Report and Order*, ¶ 98 (Pet. App. at A45).

[52] Petition at 20.

lic docket at the close of the rulemaking," [53] and, by petitioning for reconsideration, interested parties eventually had ample opportunity to address the staff study," [54] the courts have held that there is no procedural deficiency.[55] Indeed, this Court has held that, even where a study was not disclosed until after reconsideration was denied, this "procedural lapse" was not a "sufficient ground for reopening the proceedings before the Commission." [56]

In the present case, the Commission could not control its timetable. It could not wait to issue a Notice of Proposed Rulemaking until it had conducted its own internal studies and analyses, and it could not postpone issuing a rule until all parties had an opportunity to comment on those studies and analyses. The Act required that the Commission promulgate rules and make them effective within 180 days. In these circumstances, the Commission was required, at most, only to disclose its reliance on these studies in its final decision and to place the studies in the public record at the close of the rulemaking proceeding—which is precisely what the Commission did.[57] Petitioners had ample opportunity to challenge the

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[53] *Air Transport Ass'n of America v. CAB*, 732 F.2d 219, 224 (D.C. Cir. 1984).

[54] *National Ass'n of Regulatory Utility Commissioners v. FCC*, 737 F.2d 1095, 1121 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1224 (1985).

[55] *See also United States Lines v. Federal Maritime Comm'n*, 584 F.2d 519, 535 (D.C. Cir. 1978).

[56] *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 591 n.22 (1981).

[57] The internal staff study was placed in the record on May 1, 1985—one day before the Commission's *Report and Order* appeared in the Federal Register. *See* Memorandum of Bruce Franca, Policy Analysis Branch, to Joyce Butler, Dockets Branch (May 1, 1985). Interested parties have 30 days after a Commission decision appears in the Federal Register in which to seek reconsideration. *See* 47 U.S.C. § 405.

validity and relevance of the staff study—and of the NCTA study—in petitions for reconsideration, but they simply chose not to do so.

CONCLUSION

For the foregoing reasons, the Petition presents no issues that warrant review by this Court and should be denied.

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